



July 18, 2001

Mr. Arturo G. Michel
Bracewell & Patterson, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2001-3139

Dear Mr. Michel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149634.

The Houston Community College System (the "system"), which you represent, received a request for all documents related to the system's planned acquisition of a specified property. You state that you are providing the requestor with the information at Exhibit A. However, you claim that the submitted information at Exhibits B, C, and D is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and Rule 503 of the Texas Rules of Evidence.¹ We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we address the requestor's assertion that the system has waived any attorney-related privileges regarding the submitted information, "since it appears [the requested environmental assessments and legal opinions] were provided to the Houston Press for its article." When a governmental body voluntarily discloses privileged material to a third party, the attorney-client privilege is waived. *See* Open Records Decision No. 630 at 4 (1994). The system responds by stating that it did not voluntarily disclose or consent to disclosure of such documents, assuming such disclosure occurred. We note that we cannot resolve disputes of

¹ You also claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. However, since you do not make any arguments regarding these exceptions, we do not address their applicability to the submitted information. *See* Gov't Code § 552.301(e)(1)(A).

fact in the open records process and, therefore, must rely on the representations of the governmental body requesting our opinion. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Accordingly, we assume that the system has not voluntarily disclosed these documents and, therefore, address its claimed exceptions.

We note that section 552.022 of the Government Code makes certain information public. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). The environmental assessment document at Exhibit C is a completed report. Therefore, unless this document is expressly confidential under other law or excepted from disclosure under section 552.108, it must be released to the requestor. You claim that this document is excepted from disclosure pursuant to section 552.107 of the Government Code. However, our office has previously concluded that section 552.107 is a discretionary exception and, thus, is not "other law" that expressly makes information confidential. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)). Therefore, we will not address whether section 552.107 excepts the environmental assessment document at Exhibit C from disclosure.

However, you also claim that the environmental assessment document at Exhibit C is excepted from disclosure pursuant to Rule 503 of the Texas Rules of Evidence. Although this office does not generally address the applicability of discovery and evidentiary rules to submitted information, the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will address whether Rule 503 of the Texas Rules of Evidence excepts the environmental assessment document at Exhibit C from disclosure. Rule 503 provides in pertinent part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure). Based on your representations and our review of the environmental assessment document at Exhibit C, we conclude that it is a confidential communication between a lawyer and the lawyer's representative and is, thus, excepted from disclosure pursuant to Rule 503 of the Texas Rules of Evidence. Accordingly, you may withhold the environmental assessment document at Exhibit C from the requestor.

You claim that the submitted information at Exhibit B and the remaining information at Exhibit C is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107 protects information within the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). Purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *See id.* at 3. In addition, factual recountings of events or the documentation of calls made, meetings attended, and memos sent are not protected. *See* Open Records Decision No. 574 at 5 (1990). After careful review of the submitted information at Exhibits B and C, we agree that most of it constitutes either a client confidence or an attorney's legal advice or opinion provided in furtherance of the rendition of legal services to the client. Therefore, you may

withhold the marked information at Exhibits B and C from the requestor pursuant to section 552.107 of the Government Code.

You claim that the submitted information at Exhibit D is excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at * 5 (Tex. App.--Jan. 11, 2001, no pet. h.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. See *Arlington Indep. Sch. Dist.* at * 6-7; ORD 615 at 4-5. The submitted documents at Exhibit D are not internal communications of the system consisting of advice, recommendations, opinions relating to the system's policymaking processes. Therefore, neither document is excepted from disclosure pursuant to section 552.111 of the Government Code. Accordingly, you must release these documents to the requestor.

In summary, you may withhold the submitted environmental assessment document at Exhibit C from disclosure pursuant to Rule 503 of the Texas Rules of Evidence. You may withhold from disclosure the marked information at Exhibits B and C pursuant to section 552.107 of the Government Code. You must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 149634

Enc. Marked documents

c: Mr. Kelly D. Brown
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(w/o enclosures)